NOT PRECEDENTIAL – NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

ANDERSON POLEON, DAVID STEVENS, AKEEM NEWTON, and JEROME ASHE, Plaintiffs, v. GENERAL MOTORS CORPORATION, Defendant.	)	CIVIL NO. 99-0127

MEMORANDUM OPINION

Finch, Chief J.

THIS MATTER comes before the Court on Defendant's Motion to Strike/Exclude Testimony of Dr. Chester D. Copemann's Supplemental Reports and Expert Testimony. Having held a Daubert Hearing on May 26, 2005, examined the briefs prepared by the parties, and taken this matter under advisement, the Court issues the following ruling.

I. Background

This case arises out of a products liability action brought by Plaintiffs who suffered injuries when the Chevrolet Blazer, manufactured by Defendant General Motors and driven by Plaintiffs, rolled over during an accident. Plaintiffs seek to have Dr. Copemann testify, at trial, as an expert in vocational assessment regarding Plaintiffs' occupational functioning, competitive

access to the labor market, and lost wages.

Dr. Copemann uses a methodology called the Transferable Skills Analysis (hereinafter "TSA"). According to Dr. Copemann, the TSA methodology is a process by which jobs are identified that are consistent with an individual's capabilities and functional restrictions in order to define the jobs that an individual performed before an injury, and identify those skills which individual has that can be transferred to current jobs based on any identified functional limitation. See Transcript of Daubert Hearing dated May 26, 2005, at 25.

On September 3, 2003, this Court opined that Dr. Copemann's qualifications were "highly questionable" to render expert opinion testimony and the methods employed by Dr. Copemann were not reliable. This Court based its ruling on the fact that Dr. Copemann did not speak with Plaintiff's employer, review Plaintiffs' work, nor did he speak with Plaintiffs' significant others in order to reliably assess Plaintiffs' occupational functioning, competitive access to the labor market, and lost wages.

On October 24, 2003, this Court declined to reconsider the Order of September 3, 2003, but granted Plaintiffs time to cure their defects in expert testimony through which ever manner they chose. On May 26, 2005, this Court held a Daubert hearing to assess whether Plaintiffs did in fact cure their defects regarding the Court's concern with Dr. Copemann's qualifications along with the reliability of his methodology.

II. Standard for Expert testimony

Preliminary questions concerning the qualification of a person to be a witness is a threshold matter that must be determined by a trial court. See Fed. R. Evid. 104(a). The

admissibility of a person to be qualified to give expert opinion testimony is governed by Federal Rule of Evidence 702, which allows testimony that is qualified, reliable, and fit within the facts of a particular case. See Fed. R. Evid. 702; see also In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 741-43 (3d Cir. 1994).

Before an expert witness may offer an opinion, he must first be qualified by virtue of specialized expertise. See Elcock v. Kmart Corp., 233 F.3d 734 (3d Cir. 2000). The basis of specialized knowledge required of an expert witness can be practical experience as well as academic training and credentials, although, at a minimum, a proffered expert witness must possess skill or knowledge greater than the average layman. See Betterbox Communications Ltd. v. BD Technologies, Inc., 300 F.3d 325 (3d Cir. 2002). Furthermore, there is a liberal policy towards the admissibility regarding the qualifications of an expert. See Paoli, 35 F.3d at 741; see also Hammond v. Int'l Harvester Co., 691 F.2d 646, 652-53 (3d Cir. 1982).

III. Analysis

There are two issues that this Court must address: 1) whether Dr. Copemann is qualified to testify as an expert in vocational assessment analysis; and 2) whether Dr. Copemann's methodologies are reliable.

A. Qualifications of Dr. Copemann

This Court's concern with Dr. Copemann's qualifications stems from the Third Circuit Court of Appeals opinion in Elcock v. Kmart Corp., 233 F.3d 734 (3d Cir. 2000). In that case, the Court stated that Dr. Copemann was marginally qualified to perform a vocational

rehabilitation assessment and a district judge would be free to decline to qualify him..." Id. at 744. However, a review of the record indicates that Dr. Copemann has the requisite credentials, training, skill, knowledge, and experience to qualify him as an expert in vocational assessment analysis.

During the Daubert hearing, Plaintiffs provided evidence and Dr. Copemann testified extensively regarding his qualifications to testify as an expert witness in vocational assessment. Dr. Copemann testified that he has performed psychological evaluations on social security claimants for disability, taught various seminars in vocational assessment, and is a member of several professional rehabilitation organizations and societies. In addition, the evidence shows that Dr. Copemann took and passed an exam given by the Commission on Certification of Work Adjustment and Vocational Evaluators (CCWAVES).

Due to his education, training, and experience in the area of vocational assessment analysis, along with the Third Circuit's liberal policy of qualifying experts, this Court concludes that Dr. Copemann possesses the skill and knowledge greater than the average layman and thus, is qualified to testify as an expert in this case.

B. Methodology

Even if Dr. Copemann is found to be a qualified expert on vocational assessment, his methodology must comply with Rule 702. Thus, Dr. Copemann will not be allowed to give expert testimony if his methodologies are not deemed to be reliable.

In the September 3, 2003 Order, this Court cited Henry v. Hess Oil Virgin Islands Corp., 163 F.R.D. 237 (D.V.I. 1995), as its basis for finding that Dr. Copemann's methods and

procedures to be unreliable in determining plaintiff's earning capacity. The Court based its reasoning on the fact that Dr. Copemann never contacted the Plaintiffs' employer to determine Plaintiffs' employment status or to ascertain whether work was available for Plaintiff with the company.

However, after further consideration and review, this Court is satisfied that interviewing Plaintiffs' employer and significant others are not required of the methodology employed by Dr. Copemann. It is quite clear to this Court that the steps involved in the TSA does not call for an expert to interview Plaintiffs' employer and significant others to render a reliable vocational evaluation.

Nevertheless, despite the fact that the TSA methodology does not require an expert to interview the employers or significant others of Plaintiffs, this factor does not end the inquiry into Dr. Copemann's methodologies. The application of Dr. Copemann's methodology must still be able to produce reliable results.

In In re Paoli R.R. Yard PCB Litig., the Court laid out a non-exclusive eight-factor test that a Court must take into account in evaluating whether a particular scientific methodology is reliable. See In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 742 n. 8 (3d Cir. 1994) (citing Daubert and United States v. Downing, 753 F.2d 1224, 1238-41 (3d Cir. 1985), as the source of those non-exclusive factors). These factors include:

> (1) whether a method consists of a testable hypothesis; (2) whether the method has been subject to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; (5) whether the method is generally accepted; (6) the relationship of the technique to methods which have been established to be reliable; (7) the qualifications of the expert testifying on the methodology; and (8) the non-judicial uses to which the method has been put.

See Id. At 742 n. 8.

While Paoli applied these factors to scientific methods, the Supreme Court specifically stated that these factors must also be applied to non-scientific methods. See Kumho Tire Co., Ltd., v. Carmichael, 526 U.S. 137, 152, 119 S. Ct. 1167, 143 L.Ed.2d 238 (1999).

After hearing testimony at the Daubert hearing, the Court is not convinced that Dr. Copemann's methodology passes the Paoli test. At the conclusion of the Daubert hearing, counsel for Defendant GMC argued that Dr. Copemann's methodology of assessing Plaintiffs' occupational functioning was not reliable mainly because Dr. Copemann did not use all available information to him that would, as counsel argues, make his methodology objective. In considering the legal standard as articulated in Daubert, and its progeny, and the statements of Dr. Copemann himself, this Court finds that Copemann's methodologies are not susceptible to a testable hypothesis and thus, are not reliable.

During his testimony, Dr. Copemann detailed the steps involved in conducting a vocational assessment analysis using the Transferrable Skills Analysis. This Court is mainly concerned with Step 5; the Residual Functional Capacity Profile. Dr. Copemann explained:

> "The residual functional capacity profile is where you take unadjusted vocational profile, and adjust it based on the medical reports and other objective test data that you have."

See Transcript of Daubert Hearing, May 26, 2005 at 34-35.

Furthermore, in response to a question on cross-examination from Defendant's counsel on whether an expert should consider all of the relevant medical information about the individual being evaluated, Dr. Copemann stated, "That is the case." See Transcript at 2. Thus, according to Dr. Copemann's testimony, an expert using the TSA methodology must consider all medical

reports relevant to the analysis. Nevertheless, Dr. Copemann neglected to use the report of Dr. Pedersen's Independent Medical Examination which, essentially, concluded that each of the Plaintiffs would make a full recovery and could return to work as a police officer.

Dr. Copemann testified that he did not consider Dr. Pedersen's report because it was his understanding that he was only supposed to supplement his initial report as directed by the October 24, 2003, Order. See Transcript at 72. Despite Dr. Copemann's understanding, it was his duty to consider all new and relevant information that he possessed and that was available to him in order to make his findings objective, and thus, reliable. Dr. Copemann was not free to include certain information and exclude other information simply to reach the conclusion he desired. Dr. Copemann was obligated to evaluate all objective information in order to reach his conclusions. Dr. Pedersen's report was available to Dr. Copemann at the time he supplemented his initial report and he should have considered his findings in conducting a vocational assessment analysis on all Plaintiffs.

Dr. Copemann concluded that three of the Plaintiffs suffered between a 83.1% and 100% loss of access to the job market. See Reports of Dr. Copemann dated March 27, 2002 at 20 (Anderson Poleon), March 28, 2002 at 23 (Akeem Newton), and April 2, 2002 at 22 (David Stevens). However, as previously stated, Dr. Pedersen found that all of the Plaintiffs would be able to return to work as police officers. This Court finds it hard to believe that another vocational expert using all of the relevant information available to him, including the medical reports of Dr. Pedersen, would be able to replicate the results of Dr. Copemann. It would seem that another vocational expert considering Dr. Pedersen's medical report could conclude that all Plaintiffs would be able to perform the same functions as they did as police officers and would

not suffer a complete and total loss of access to the job market.

Thus, based on the evidence presented at the Daubert hearing and, in particular, his own admissions, the Court concludes that Dr. Copemann's report is inadmissible under Rule 702 of the Federal Rules of Evidence.

IV. Conclusion

Due to the prejudicial nature of expert testimony at trial, there is a heightened need to assure the credibility and reliability of expert witnesses. While Dr. Copemann possesses the requisite credentials to testify as a vocational expert, his methodologies are not reliable and he will not be allowed to testify. Accordingly, Defendant's Motion to Strike is GRANTED and the supplemental reports of Dr. Copemann for each of the four Plaintiffs are hereby stricken. In addition, the Court's September 3, 2003 Order excluding the testimony of Dr. Chester D. Copemann is hereby AFFIRMED.

ENTER:

DATE: October 18, 2005

/s/ Raymond L. Finch
Honorable Raymond L. Finch
Chief Judge

ATTEST:
Wilfredo F. Morales

_____
Deputy Clerk

cc: Magistrate Judge George W. Cannon, Jr.
Britain H. Bryant, Esq.
Lee J. Rohn, Esq.

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ORDER

THIS MATTER comes before the Court on Defendant's Motion to Strike/Exclude testimony of Dr. Chester D. Copemann's Supplemental Reports and Expert Testimony. For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that Defendant's Motion to Strike is hereby **GRANTED** and the supplemental reports of Dr. Copemann are hereby **STRICKEN.**

IT IS FURTHER ORDERED that the Court's September 3, 2003, Order excluding the testimony of Dr. Chester D. Copemann is hereby **AFFIRMED.**

ENTER:

DATE:October 18, 2005

/s/ Raymond L. Finch
Honorable Raymond L. Finch
Chief Judge

ATTEST:
Wilfredo F. Morales

_____
Deputy Clerk

cc: Magistrate Judge George W. Cannon, Jr.
Britain H. Bryant, Esq.
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